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No. 606

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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This is a reply brief. We shall not attempt either to repeat or to restate the arguments already set forth at some considerable length in our main brief. We deal only with new arguments advanced on behalf of the respondents, and with the specific matters in their briefs which seem in most urgent need of correction.

The roman numeral headings of the present reply brief are keyed to the points argued in our main brief.

I.

At the trial (R. 635–650), in the court below (Brief for Appellant Radovich, pp. 18–20), and in opposition to the petition for certiorari in this

Court (Radovich, Br. Opp. 20–22), Radovich argued that his March 1945 statement was inadmissible because he was illegally in custody when he made his September 1944 statement, since he had not been served with charges within eight days after his original confinement on August 9, 1944, and because his detention had been continued until September 16, 1944, some ten days after the making of the September statement.

In our main brief, we pointed out that the 70th Article of War provided for notice of charges on two separate occasions, and showed that the preliminary investigation required by that Article had been completed well before Radovich made his September statement (U. S. Br. 34–42). We also pointed out that, before making that statement, he was so far advised of the nature of the charges against him that he had submitted his resignation for the good of the service (U. S. Br. 40–41). And we showed, by analysis of the changes made by Congress in what is now AW 70, that all rigid limits on the time during which an accused officer might be restrained prior to trial had been eliminated in 1920, that now the only time limit stated was specifically qualified by the phrase, "if practicable," and that in place of arbitrary schedules there had been substituted a criminal sanction for "unnecessary" delay (U. S. Br. 42–56).

Faced with this analysis of the statute, which was not before the court below, Radovich now mends his hold. His present contention (Br. 24–27) is that his confinement was illegal in its inception, and that the Commanding General, First Air Force, was acting without authority of law when, on August 9, 1944, he directed that Radovich be confined (R. 591).

This new contention is equally without merit.

The 69th Article of War specifically provides (10 U. S. C. 1541):

> Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement

The only restrictions on the power to confine an officer in force in August 1944 were three: first, that an officer could be confined only by commanding officers (MCM, par. 20; Army Regulations 600–355, July 17, 1942, par. 2*a* (1)); second, that the restraint imposed before trial should be the minimum necessary in the circumstances (MCM, par. 19; Army Regulations 600–355, July 17, 1942, par. 3*a*); and third, that the accused should not be restrained except on personal knowledge of or after inquiry into his offense

(MCM, par. 19; Army Regulations 600–355, July 17, 1942, par. 3*a*).

The order to confine Radovich was given by the Commanding General, First Air Force, and showed on its face that Radovich was charged with offenses under the 95th and 96th Articles of War (R. 591). There thus remains for inquiry only the narrow question whether Radovich's restraint by way of confinement was necessary.

Radovich refers (Br. 24–26) to the Army's Technical Manual on Military Justice Procedure to establish that he should only have been arrested, quoting *inter alia* the passage which points out that "Confinement results in loss of manpower."

But the considerations there adduced pertain to policy; here we are concerned with power. Neither the *Manual for Courts-Martial* nor the Army Regulations lay down absolute limitations. They simply establish standards. They do not attempt to control the actual exercise of a commanding officer's discretion. And, in the present case, there was no assurance, when Radovich arrived at Mitchel Field, to which place he had been ordered to face the consequences of his misdeeds, that he would remain tractable, or that he would not attempt to escape.[1]

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[1] Escape from confinement or breach of arrest would not carry the death penalty suggested by counsel at note 11, Br. 26. See AW 69 and AW 43.

All that was known was the nature of his offense, an offense amply reflected by the present record, an offense which certainly was "serious" within the meaning of the 69th Article of War. In its aspect of bribery, it carried a penalty of three years' confinement in the penitentiary, and perpetual disqualification from holding office. See Section 117 of the Criminal Code, 18 U. S. C. 207; see AW 42; compare GCMO 240, at U. S. Br. 124. In its purely military aspects, it involved conduct unbecoming an officer and a gentleman, carrying with it the mandatory penalty of dismissal, and branding the guilty person as morally unfit for further association with his fellow officers. See 2 Winthrop, *Military Law and Precedents* (2d ed. 1896) *1104–1106. And, apart from the foregoing, the offense of taking money to enable some soldiers to escape dangers which necessarily had to be faced by others, in flat disregard of the declared policy of Congress "that in a free society the obligations and privileges of military training and service should be shared generally,"[2] is, necessarily, shocking to honest folk. We submit, therefore, that every consideration of policy justified—indeed, required—General Hunter to confine Radovich immediately when this officer set foot on Mitchel Field.[3]

---

[2] Section 1 (b) of the Selective Training and Service Act of 1940, 50 U. S. C. App. 301 (b).

[3] The "loss of manpower" argument is of course irrelevant in the case of an officer. Even when an officer is merely

Radovich, therefore, was lawfully confined. Later, when it seemed likely that he would not attempt to escape, i. e., that confinement was probably not necessary in the circumstances, he was released from confinement, and subjected only to restriction—precisely as the *Manual* and the Army Regulations contemplate.

But Radovich argues at some length and with considerable vehemence (Br. 27–28, 31–32) that the circumstances in which he was confined were improper.

General Hunter's order to the Base Commander directed simply that Radovich "be confined" (R. 591). We are advised that, generally speaking, the only facility available at Army installations for the confinement of officers is the locked ward of a hospital.[4] Incarceration in a guard house would involve a degradation of rank which, in the case of officers and noncommissioned officers alike, is prohibited while they still hold such rank (see, e. g., MCM, par. 106; Army Regulations 600–375, May 17, 1943, pars. 8*c*, 20*d* (2)). An officer does not normally enter a penal institution until, after his dismissal has been confirmed pursuant

placed in arrest, he may not exercise command (Army Regulations 600–355, July 17, 1942, par. 7*a*) or perform any military duty. See 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) *161 cf. Dig. Op. JAG (1912–1940), par. 427 (2).

[4] It is sometimes possible to use a room at an officers' club for the purpose, and to station an armed guard outside the door; but this is rare.

to the 48th Article of War, he ceases to be in the Army. Cf. 3 Bull. JAG 230–231, par. 405 (1).

The locked ward in any hospital is, of course, used for the treatment of the mentally ill; it is referred to, in Army colloquialism (and throughout Radovich's brief), as the "nut" ward. The record shows that, at least during the inception of his confinement, Radovich was treated as a patient rather than as a prisoner. Whether it was wise administration thus to spare him the outward ignominy of one charged with a serious offense we need not here consider; the significant point is that his spirit was not affected, and that, *non constat* the allegations in his brief (Br. 27, 28), he was not in any sense held *incommunicado* when interviewed by the F. B. I. agent in September.

The record shows clearly that, prior to that visit, he had consulted with counsel (R. 576, 578–579); that he probably consulted with counsel during the course of the interview (R. 543, 549); and that he interrupted the interview on several occasions to make telephone calls (R. 543, 549).

Moreover, he made his statement without any pressure or persuasion, simply because he was convinced that this course was in his interest (R. 542–543, 549–550). He had previously submitted his resignation for the good of the service, in the face of charges (R. 596), and with full realization that acceptance of that resigna-

tion did not imply separation from the service under honorable conditions (R. 597). It is significant that at no time, before, during, or after trial, did he ever repudiate or attempt to recall either his statement or his resignation.

Counsel in their briefs make much of the hardships allegedly visited upon Radovich consequent upon his assimilation to the status of patient (Br. 27–28). While pointing out that he was several times decorated for gallantry and unusual devotion to dufy (Br. 5–7), they nonetheless insist that he was so cowed by his confinement that his voluntary statement made while so confined must be rejected by the courts as not entitled to credence (Br. 27, 32), and this in the face of evidence that, in the very course of giving his statement, he deliberately and willfully disobeyed an order of his military superiors that he remove his decorations (R. 553, 577–578, 784–785).

We agree with the United States Attorney (R. 1067) that "There is no basis whatever for assuming that this man who flouted and defied the order of the Army to remove his decorations would meekly submit and make damaging statements against his own interest to two civilians."

After Radovich's March confession was admitted into evidence (R. 655–661), he was permitted to present to the jury full and circumstantial testimony concerning not only the

circumstances under which that statement was given (R. 672–677), but also all the circumstances incident to the making of the September statement (R. 729–731). All the details of Radovich's mode of life as a patient in the locked ward were spread at length upon the record (R. 677–682, 731–743), and counsel in their summing up made the most of them. Here are some of the hyperboles of advocacy presented to the jury:

> • • • The truth of the matter is that that September statement was extorted and coerced out of Major Radovich by a third-degree that was as cruel and as effective as any treatment with a blackjack and a rubber hose ever was. Now let us see what the situation was. Major Radovich gets back from overseas, he is on the Pacific Coast somewhere, where his home is; he gets orders to report to Mitchel Field, as far away from home as he can get and still stay in this country. He reports to Mitchel Field for duty. No suggestion about what is going to happen to him. As soon as he gets there what happens? He is thrown in a crazy ward and put in a cell. He is stripped of his uniform. He is given a bathrobe, with no cord on it, and a pair of hospital pajamas. He is not allowed to use the telephone. He does not have counsel. He can't communicate with his wife or his family. He is watched, he is watched

night and day. He is watched when he sleeps, he is watched when he goes to the bathroom. He has eyes staring at him. He is deprived of his knife and his fork and he is fed like a wild beast. And this goes on for days and days and weeks and weeks. Locked in that ward with crazy men and screaming drunks, locked there for weeks under those conditions, held incommunicado.

Let me ask you, if you had the choice of being beaten with a piece of rubber hose and going through weeks of that kind of confinement, which would you prefer? Which would break you down the more? A little beating in some back room of a police station in the old-fashioned orthodox way of giving the third degree, or this kind of subtle, cruel, ceaseless beating of the spirit that Radovich took in the crazy ward? You know which would be more effective. And it was more effective. (R. 961-962.)

* * * * *

* * * you will find that the testimony and the evidence against Major Radovich, when you boil it all down, comes to this: one statement, supported only by the testimony of Flynn, sweated out of Radovich by the third degree, that one statement plus a flimsy tissue of circumstantial evidence, full of doubt, full of contradiction, full of perjury. * * * (R. 970).

* * * * *

I say there are only two bits of evidence here against Radovich, only two, and one of them has been dealt with very fully by Mr. Robb, that is, these F. B. I. statements, Flynn-Radovich statement, nut ward statement. One thing, I would supplement Mr. Robb's argument by saying: If the jury finds that the nut ward statement followed by this statement made by Flynn up here in this building was induced or coerced in the least, in the least extent, you have got to throw it aside. That I believe to be the law laid down by the Supreme Court of the United States. (R. 972.)

The jury were instructed that they could consider the circumstances surrounding the making of the statement in passing on the weight and credibility to be given thereto (R. 1141):

I have also admitted for your consideration testimony in regard to the circumstances existing at the time and place of the making of these statements for your consideration, not on the question of whether the statements should have been admitted into evidence, but for such bearing as such facts and circumstances might have in your judgment on the weight and credibility of the statement. In other words, the primary question for you to determine in regard to these statements is whether or not they are true, or how much of them is true. It is entirely within your function to believe all of any statements or

> any part thereof, or none. And you should, of course, compare what is said in the various statements with the other facts and circumstances disclosed by the other evidence in the case.

In the face of this instruction, which permitted them to disregard Radovich's statement in its entirety, and after having heard counsel's contention that that statement had been induced by calculated cruelty, the jury convicted him. We submit that their general verdict of guilty forecloses any further contention that the statement was involuntary. Cf. *McNabb* v. *United States,* 318 U. S. 332, 338–339, note 5.

II

If the question of double jeopardy is still in the case and not moot, then, as we have pointed out, the present case is governed by *Fall* v. *United States,* 49 F. 2d 506 (App. D. C.), certiorari denied, 283 U. S. 867. There Fall's conviction for bribery was sustained, although Fall and Doheny had previously been acquitted of conspiracy to defraud the United States, although at the conspiracy trial the facts alleged in the indictment and the evidence offered in support thereof were substantially the same as the allegations in and the evidence in support of the bribery indictment involving Fall alone, and although one of the overt acts alleged in the conspiracy indictment was the payment by Doheny to Fall of the very

same $100,000 involved in the bribery charge. The Court of Appeals held that the acquittal on the conspiracy indictment did not preclude Fall's trial for bribery, since in the conspiracy case the jury might have felt that Doheny had given the money to Fall in good faith as a loan without intent to defraud, whereas in the bribery case the jury was concerned with Fall's state of mind alone.

It is highly significant that Radovich does not undertake to discuss, let alone distinguish, the *Fall* case. He avoids it—by avoiding mention of it. Instead, he first characterizes and then misstates the Government's arguments.

He says (Br. 41)—

> Indeed it seems absurd to argue, as the Government apparently does, that Radovich could have accepted the money from the Bayers "for the purpose of effecting the transfer" of the named soldiers, in the absence of an agreement and a common design between him and the Bayers.

And further (Br. 41–42)—

> The argument of the Government, that the court-martial would have acquitted Radovich if only the corrupt agreement had been proved, is literally fantastic.

Here is what we actually said (U. S. Br. 71–72):

> * * * an agreement need not necessarily have been proved to sustain the court-martial charges. The sole question before the court-martial was whether Rado-

> vich had received money from the Bayers to bring about the transfers of Martin and Melvin. Whether he did so pursuant to agreement with the Bayers, or whether he extorted the money from the Bayers by threats as they claimed, he would nevertheless have been guilty of the offense charged in the military specifications. The conspiracy alleged in the indictment, however, could not be established without proof of a meeting of minds between Radovich and the Bayers, and the trial judge specifically charged the jury that the offense was not established if the jury found that Radovich had obtained the money from the Bayers by extortion. * * *

Next, after discussing the *Fall* case, we argued (U. S. Br. 72–73):

> * * * So here, in reverse, the court-martial was concerned only with Radovich's state of mind when he accepted the money; it was not required to find any agreement by the Bayers to defraud the United States in paying over the money. At the civil trial, however, agreement among the Bayers and Radovich was the essence of the offense, and the jury had to find that the Bayers had voluntarily agreed to make payments to Radovich.

And, finally, we said, in response to Radovich's argument based on the military practice of making findings by exceptions and substitutions (U. S. Br. 75):

> As we have shown, the court-martial was not required to find an agreement in order to convict; the jury was. The court-martial was concerned only with Radovich's state of mind, the jury with the Bayers' as well. Consequently, the offense alleged in the indictment could not by exceptions and substitutions have been carved out of the offenses alleged in the military specifications.

In short, our argument is, not that the court-martial could not have convicted Radovich if only the agreement was proved, but that the court-martial could have convicted even if no agreement had been proved.

III

Since even the effect of admitted error cannot be properly weighed except in its setting (*Kotteakos* v. *United States,* 328 U. S. 750), obviously a claim of error cannot be. Under the present heading the Bayers contend (Br. 24–36) that it was error for the trial judge, four hours after the case had been submitted to the jury, to refuse to reopen the case to put into evidence a slip showing a collect call from Arlington, Virginia, to the Bayers from one "Ravish" on November 24, 1943.

We pointed out in our main brief (U. S. Br. 76–84) why reopening the case to have introduced evidence of the call would have attached to an

inconclusive fact wholly unwarranted significance, and why the ruling of the court below that the trial judge's refusal to reopen amounted to an abuse of discretion was based on a misconstruction of the United States Attorney's summing up and of the significance of the excluded evidence in relation thereto.

We will not repeat that foregoing argument here. But we think that the immateriality of the proffered evidence becomes even more apparent when it is viewed against the background of the entire argument of the United States Attorney dealing with the Bayers' defense of extortion.

A. (1) The United States Attorney commenced his argument on this subject by pointing out that Colonel Vidal, Colonel Jacobson, Captain Kogan, Major Saffron, and Joseph Busch had all testified that Samuel Bayer pleaded with them and begged them to help secure the result which Radovich was ultimately able to accomplish, namely, the boys' transfer out of the Airborne Engineer units which had been alerted for overseas service (R. 1069).

Colonel Vidal had testified that on two occasions, Samuel Bayer had approached him, once in person (R. 140) and once over the telephone (R. 141), to see whether he could do something to get the boys out of the Airborne Engineers. Colonel Jacobson testified that, after he had been transferred to Albany, Samuel Bayer telephoned

him from New York in September 1943 in a very upset and excited tone of voice, saying that "the boys were alerted and they were in a hot outfit and that they were going overseas," and asked Colonel Jacobson whether he could do anything for them (R. 373–374). When Colonel Jacobson said that "there was nothing that could be done and nothing should be done," Samuel Bayer fainted (R. 374). Captain Kogan testified that in late September 1943, Samuel Bayer asked him if he thought there would be any trouble if the boys were transferred out of the alerted Airborne Engineers (R. 283). "I tried to tell Mr. Bayer at that time that I thought there would be very serious consequences, and Mr. Bayer cried out and— * * * the gist of what he said was he wanted him out of that alerted unit for overseas into another unit" (R. 283–284). Major Saffron testified that in the summer of 1943, Samuel Bayer was very much agitated, frightened, and concerned because his son was in the Airborne Engineers and was about to be sent overseas (R. 176, 181, 182). At that time, Samuel Bayer said, "I would do anything in my power to keep my boy from going overseas" (R. 176). Major Saffron said there was nothing he could do, that the case was a celebrated matter at Mitchel Field, and that it was full of dynamite; Samuel Bayer did not deny the truth of these rumors (R. 176–177). Joseph Busch confirmed

the conversation between Samuel Bayer and Major Saffron (R. 154–160).

(2) The United States Attorney then argued (R. 1069) that the payments to Radovich were consistent with Samuel Bayer's statement to Major Saffron, just quoted, that he would do anything to keep his boy from going overseas.

(3) Next, the United States Attorney pointed to the Bayers' conduct (R. 1069). He referred to the fact that both of them had lied to Colonel Snyder, who in August 1944 was investigating the military charges against Radovich (R. 235, 404). At that time both of the Bayers denied making any payments of money, denied paying for any uniforms, and denied speaking to any Army officers for the purpose of effecting the transfer of the two boys (R. 509–513); and Elias Bayer denied going to Goldsboro, North Carolina, in November 1943 (R. 513). The United States Attorney also referred to the evidence which showed that the I. Buss Uniform Co. had, at Samuel Bayer's request, altered its books to indicate that payment for the uniforms had been made by the officers themselves, rather than by the Bayers' Plymouth Thread Co. (R. 190–195). The United States Attorney asked the jury whether the Bayers' action in lying to the investigating officer and in procuring a falsification of the Buss Company's books was consistent with extortion or was the conduct of men driven by a

sense of guilt and by a fear of disclosure (R. 1069).

(4) He went on to argue that the claim of extortion was never raised until the investigation began to close about the Bayers (R. 1069–1070), and that, while the Bayers may have paid a little more than they may have anticipated paying, particularly after all the other favors they had lavished on Radovich, still (R. 1070),

> can there be any doubt that the payments were made for favors which the Bayers avidly and avariciously sought? Can there be any doubt that the Bayers sought to obtain and were willing to pay for and did pay for favors, for considerations to which they were not legally entitled?

(5) The United States Attorney next answered the contention that in making their gifts to these Army officers the Bayers were simply expressing the gratitude of civilians to those who serve in the forces in time of war, pointing out that the record showed no gifts to any but officers who could help with the transfers, and that all such officers except Captain Kogan had been in the First Fighter Command (R. 1070).

(6) At that point, and only at that point, did the United States Attorney proceed to show that, at the time of the alleged threats by Radovich to take the boys with him to Burma unless he received $5,000, he had already put it beyond his power to carry out those threats (R. 1070–1073).

It is that portion of the charge which we quote and discuss in our main brief (U. S. Br. 18–19, 76–84).

The foregoing summary of the United States Attorney's closing argument on the defense of extortion emphasizes and underscores what we have already pointed out, that when the telephone slip is considered in its setting, and not abstractly isolated from the remainder of a long record, its immateriality becomes patent. To have admitted it at that point would simply have confused. The trial judge exercised a sound discretion in refusing at that point, long after the jury had retired, and at the close of a long trial, to reopen the case for the taking of additional—and wholly inconclusive—evidence.

B. We have documented the United States Attorney's argument on the defense of extortion with record references, not only in order that it might be considered against the context of the evidence in the case, but also because the Bayers' brief falls considerably short of reflecting all of the pertinent facts.

(1) The Bayers start by saying that Martin Bayer and Melvin Usdan voluntarily enlisted in the Air Corps (Br. 7). They fail to state that Samuel Bayer had them volunteer for the Air Corps in order to avoid having them drafted and assigned to the infantry (R. 184, 276–277).

(2) The Bayers admit that their concern, the Plymouth Thread Corporation, paid the Buss Company for the uniforms furnished to Radovich and other officers of the First Fighter Command (Br. 9). They fail to state that, at Samuel Bayer's request, the Buss Company's books were later altered to show that the officers themselves paid for the uniforms (R. 190–195; Govt. Ex. 5, 6, 7, R. 192, 193, 195, 1219, 1221, 1223).

(3) The Bayers now admit that Samuel Bayer gave Colonel Jacobson a set of automobile tires (Br. 9). They fail to state that Samuel Bayer denied making this present in his statement to the United States Attorney (R. 1258). Nor do they state, what is the fact, that this gift was made after Colonel Jacobson had transferred the boys from Base Headquarters to the First Fighter Command (R. 370–372),* and after Samuel Bayer had been assured by Colonel Jacobson that this transfer would mean that the boys would stay at Mitchel Field for another year (R. 278).

(4) Throughout their brief, the Bayers urge that the boys had received only scanty basic training (Br. 10), and that Samuel Bayer was upset at their transfer overseas without adequate basic training (Br. 12, 15). But the record is bare of a single intimation that Samuel Bayer was concerned with the boys' training or lack of

*The gift was made on April 21 (R. 370); the transfer had been effected on April 15 (R. 1312).

training. He did not want them overseas, trained or untrained. The record makes it perfectly clear that the thought about training is simply a rationalization of counsel, quite unsupported by any word of Samuel Bayer's.

(5) The Bayers quote Samuel Bayer as urging Radovich to leave the boys at Westover and Bradley Fields with the Airborne Engineers because they were happy there (Br. 13, 15). "I said 'Walter please let's forget all about the kids, they are very happy, they met a nice captain, a nice sergeant.' * * * I said 'Walter I told you once before please let's forget all about the kids, they are happy and I am happy.'" (R. 1228, 1229.) The Bayers do not say in their brief, nor did Samuel Bayer tell the United States Attorney, that in fact he approached Colonel Vidal, Colonel Jacobson, Major Saffron, and Captain Kogan in his attempts to have the boys transferred out of the Airborne Engineers, and that he fainted when Colonel Jacobson told him that nothing could or should be done (*supra*, pp. 16–18).

(6) The Bayers place Radovich in New York on the morning of November 25, urging Samuel Bayer to come to a decision on whether he will pay $5,000 to keep the boys from being sent to Burma (Br. 16, 35). But their own motion for new trial, on which they rely to establish error here (Br. 33–36), shows that Radovich was in Washington on the night of November 24/25, that

he left Washington at 9:30 A. M. November 25 and flew to Connecticut, and that he did not arrive at La Guardia Field, New York, until 4 P. M. on that day (Motion, p. 48; U. S. Br. 82–83).

(7) The Bayers twice state that the order transferring the boys from the Air Commando Group at Goldsboro into the Air Transport Command in Wilmington was dated November 29 (Br. 17, 35). This is literally true (R. 1218). But they fail to state that this transfer was directed by a letter from Headquarters Army Air Forces dated November 25 (R. 123, 1218), and that this letter was written in consequence of Radovich's telephone call to Miss Goertz on November 24 (R. 256–257). Consequently, even if, as the Bayers now assert (Br. 16), the $5,000 was paid not later than November 27, it is still clear that, when the payment was made, Radovich had put it out of his power to take Martin and Melvin to Burma.

IV

The Bayers complain at some length that the trial court's charge as to the basic issues concerning them was inadequate (Br. 18–24).

They say (Br. 20)—

> As regards the Bayers, the "basic issue" in the case was whether or not the payments had been extorted by Major Radovich by threats to violate his duty, or had

been made pursuant to conspiracy to seduce Radovich from fulfilling his duty.

They then go on to quote three sentences from the court's charge (Br. 21, 22, 23), and conclude (Br. 21)—

> It will be observed that there was no statement by the Trial Court anywhere in the charge that the jury could find that there would in law be no conspiracy or agreement on the part of the Bayers as charged in the indictment if the jury believed the contention of the defense, namely, that the Bayers were the victims of a shrewd and ruthless plan of extortion.

The difficulty with considering particular, isolated sentences of a charge instead of the charge as a whole, or even a portion of the charge, is that important aspects are apt to be overlooked. The Bayers' sampling technique in this instance has produced the very consequences which might have been anticipated; they failed to note that the trial judge did in fact charge on the precise point with which they were concerned. He added, following the sentence quoted by the Bayers at Br. 22, and preceding the sentence quoted by the Bayers at Br. 23, the following (R. 1134):

> However, as to the payments of money, if you believe that they were coerced by the defendant Radovich, that is, that they would not have been made at all in whole or in part except for Radovich's threats, then

such payments would not be the result of agreement nor any evidence of a crime. And if you so believe, and also are not satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy existed as charged in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

The foregoing intervening excerpt is nowhere quoted in the Bayers' brief.

Respectfully submitted.

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